APPENDIX.

"Exhibit 1."

IN THE SUPREME COURT OF MISSOURI

EN BANC.

MAY TERM, 1942.

Edward L. Scheufler, Superintendent of the Insurance Department of the State of Missouri, *Respondent,* versus Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange, *et al.*, *Defendants,* Central Surety and Insurance Corporation, a corporation, and R. E. O'Malley, *Appellants.*	No. 37663* No. 37664*

PER CURIAM. The respondent Superintendent of Insurance asks leave to file here a motion to transfer the above causes from Division II to this court en banc on the ground that a federal question is involved. He has also filed a similar motion in Division II, where the causes have been finally determined adversely to him. His explanation of the reason for this duplicated procedure is that if the motion to transfer be overruled by Division II he will not have exhausted all available means of securing an appellate review of the causes by this court en banc, unless he files the same motion here. This, he says, is prerequisite to an application for review by certiorari or appeal in the United States Supreme Court, under a

recent decision of that court in *Gorman* v. *Washington University*, 62 S.Ct. 962, 86 L.Ed. 895.

We do not so read the Gorman decision. According to our understanding it was based on the fact that no application for a transfer had been made *to Division I* of this court after adverse determination of the cause by that Division. (See *Washington University* v. *Gorman*, 348 Mo. 310, 153 S.W. (2d) 35.) The opinion does not expressly so state, and does say (italics and parenthesis ours): "it does not appear that the judgment thus rendered (by Division I) has been *reviewed* by the Supreme Court sitting en banc." But it further declares there was also no showing "that petitioners have made application, as they could have done under §4 of the 1890 amendments to the state constitution, to transfer the cause to the full court for review." The opinion then summarizes Secs. 1 and 4 of said amendment, and quotes part of our Rule 24, which provides: "A motion to transfer a cause under the provisions of the Constitution from either division to Court *En Banc* must be filed within ten days after the final disposition of the cause by the division, * * *." The record of the Gorman case in this court shows no application was made to Division I to transfer the cause to the court en banc.

Ever since the decision of *State* v. *Duestrow*, 137 Mo. 44, 91, 39 S.W. 266, in 1896, it has been the settled law of this state that such motions must be filed in whichever of the two Divisions of this court has decided the case; and that the court en banc cannot compel a transfer of the cause. This rule is based on the provisions of said Sections 1, 3 and 4 of the Amendment of 1890 to Article VI of our Constitution. Sec. 1 creates two divisions of the Supreme Court and gives them *concurrent* jurisdiction of all matters and causes in the court, except that Division II shall have exclusive cognizance of all criminal cases. The section contains a proviso that a cause in a Division may be transfered to the court en banc as provided in Sec. 4. And the latter section provides that for

specified reasons causes shall be transferred to the court en banc "on the application of the losing party." This has always been construed to mean that the application for the transfer must be made in the Division *from which* the transfer is sought. Under the last clause of this section either division, on application or its own motion and for reasons deemed sufficient though not enumerated in the section, may order a cause transferred to the court en banc.

Respondent calls attention to *McFadin* v. *Catron*, 138 Mo. 197, 227, 39 S.W. 771, where (respondent says) the court en banc unanimously entertained a motion to transfer a cause from Division II and denied it with the statement that no facts existed as specified in Sec. 4, warranting a transfer. He contends the court would have stricken the motion from its files without reference to the merits thereof, if it had meant to refuse to entertain the motion. But the opinion also cited the Duestrow case, and quoted the part holding that "motions filed subsequent to a judgment in a cause are matters pertaining thereto, and must be filed in the division which rendered the judgment." So, also, in *State* v. *Hamey*, 168 Mo. 167, 175, 65 S.W. 946, 57 L.R.A. 846, the court en banc unanimously ruled that an order of a Division transferring a cause to it did not operate as the allowance of an appellate review. The *Duestrow case* (137 Mo. l.c. 95, 39 S.W. l.c. 268) squarely holds that Sec. 4 of the Amendment does not give the court en banc superintending control over a Division.

The Amendment of 1890 was adopted to expedite the work of the court by creating two divisions of concurrent jurisdiction, each with the separate power to adjudicate causes coming to the court; and with the further power to determine when causes before it shall be transferred to the court en banc under Sec. 4 of the Amendment.

The application for leave to file en banc a motion to transfer the causes from Division II is denied. All concur except Gantt, J., absent.

STATE OF MISSOURI—SCT.:

I, E. F. ELLIOTT, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said Court, delivered in the foregoing entitled cause, on the 7th day of July 1942, as fully as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 14th day of July 1942

E. F. Elliott,
(Seal) Clerk.

"Exhibit 2."

IN THE SUPREME COURT OF MISSOURI

BE IT REMEMBERED that on the 25th day of October, 1941, Division Number Two of the Supreme Court of Missouri rendered an opinion in which all of the Judges concurred, in the case of *A. S. King et al., resps.* vs. *Kansas City Life Insurance Company, a corporation, app.*, No. 37426, affirming the judgment of the Circuit Court of Jackson County.

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And thereafter and on the 13th day of November, 1941, the following proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Comes now the said appellant, by attorney, and files its motion to transfer this cause to the Court en Banc.

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Which said motion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI

DIVISION NO. 2

SEPTEMBER TERM, 1941

A. S. King and I. A. Smith, Trustees of Hinkle Company,
Respondents,
v.
Kansas City Life Insurance Company, a corporation,
Appellant.

No. 37426

MOTION TO TRANSFER TO COURT EN BANC

Comes now the appellant (defendant below) and moves the Court to transfer this cause to the Court *en banc* for the following reasons:

(1) It concededly appears that all of the grounds of the motion for a new trial *raising questions of law* were abandoned, leaving only the inadequacy of the verdict ground. The opinion holds that the general order of the trial court sustaining the motion may be affirmed upon the single ground that the verdict was against the weight of the evidence. From this it follows that in *all* cases where there is a sharp conflict in the evidence such general ruling of the trial court must be affirmed. This permits the condemned practice to continue unabated and the injustice of the same to actively survive. The opinion does not abate the evil but tends to make all appeals from such orders unavailing, if perchance the movant has a weight of the evidence ground in the motion which *may* have formed the basis of the trial court's general order violative of the statute.

(2) The opinion holds that the respondents (movants below) carry their burden and comply with their obligation to point out error and that the verdict may be properly set aside by such general order whenever they point out that the motion contains a ground that the verdict was against the weight of the evidence which may have

formed the basis of the court's action even though, as here, the evidence preponderated in favor of the appellant and the issues of compensatory, exemplary and nomial damages were submitted by unchallenged instructions.

(3) The opinion requires the appellate court to (a) either itself weigh the evidence (which it has no right to do) *or* (b) to follow the old, now repudiated, practice of assuming that the trial court sustained the motion on *all* of the grounds set forth therein, - following on this point the now overruled case (among others) of *Gray* v. *Hannibal*, 29 S. W. (2d) 710, 713. The opinion vigorously challenges and negatives the correctness of both hypotheses, but, by its order of affirmance, necessarily *follows* one or the other of them.

(4) The statute (Section 1169, R. S. 1939) limits the power of the trial court in granting successive new trials. Does the order appealed from exhaust such power or may the court below grant another new trial specifically basing its order upon the weight of the evidence ground? The order below is silent; does the opinion supply the omission? *Gray* v. *Hannibal*, *supra*, seems to hold to the contrary and is not overruled on this point.

(5) By its opinion the Court overruled a number of cases, some of which were decided by Division One of this Court. The questions involved are of great importance to the bar and to the *nisi prius* judges, and should be finally and definitely settled by the entire court sitting *en banc*, thereby avoiding possible conflict between the two divisions of this Court, and, at the same time, setting at rest for all time confusing and troublesome questions, which have long sought solution, affecting orderly procedure in trial courts of law and in appellate courts as courts of error.

COOPER, NEEL & SUTHERLAND
FRANK J. ROGERS,
Attorneys for Appellant

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And thereafter and on the 16th day of December, 1941, the following further proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Now at this day, the Court having seen and fully considered the appellant's motion to transfer this cause to the Court en Banc, doth order that said motion be and the same is hereby sustained.

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STATE OF MISSOURI--Set.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages contain a full, true and complete copy of the motion to transfer to Court en Banc, together with the record entries showing the filing and sustaining of said motion, in a cause entitled A. S. King et al., respondents, against Kansas City Life Insurance Company, appellant, No. 37426, as fully and completely as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, this 9th day of July, 1942.

E. F. Elliott

(seal) Clerk, Supreme Court of Missouri.

"Exhibit 3."

IN THE SUPREME COURT OF MISSOURI

BE IT REMEMBERED that on the 10th day of June, 1941, Division Number Two of the Supreme Court of Missouri rendered an opinion in which all of the Judges concurred, in the case of *Edward F. Klotsch, resp.* vs. *P. F. Collier & Son Corporation and Elmer U. McAtee, apps.*, No. 37124, reversing the judgment of the Circuit Court of the City of St. Louis as to the appellant P. F.

Collier & Son Corporation, and affirming the judgment as to the appellant Elmer U. McAtee.

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And thereafter and on the 4th day of August, 1941, the following proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Comes now the said respondent, by attorney, and files his motion to transfer this cause to the Court en Banc.

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Which said motion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI

DIVISION No. 2.

MAY TERM, 1941.

Edward F. Klotsch, *Respondent,* vs. P. F. Collier & Son Corporation, a Corporation, and Elmer U. McAtee, *Appellants.*	No. 37124

RESPONDENT'S MOTION TO TRANSFER TO SUPREME COURT IN BANC.

Comes now the respondent in the above-entitled cause and moves the Court to transfer this cause to the Supreme Court in banc, and as grounds of this motion states:

I.

Because the Court's opinion filed herein and per curiam opinion filed in ruling respondent's motion for a rehearing, are in direct conflict with the rulings and decisions of this Court in banc and of Division No. 1 of

this court in holding that respondent was conclusively bound by the adverse portions of defendant McAtee's testimony and was not entitled to the benefit of the favorable portions of said witness' testimony and the other evidence and the inferences to be drawn therefrom.

Perryman v. *Missouri Pac. Ry. Co.*, 31 S. W. (2d) 4 (Div. No. 1);

Gaugh v. *Gaugh* (Mo. Sup. in banc), 11 S. W. (2d) 729;

Black v. *Epstein*, 120 S. W. 754, 221 Mo. 286;

Smith v. *Kansas City Pub. Serv. Co.*, 43 S. W. (2d) 553.

II.

Because the Court's opinion filed herein and per curiam opinion filed in ruling respondent's motion for a rehearing overlook testimony printed in the record, other than testimony of McAtee on cross-examination tending to prove that he intended collecting for his master, Collier, sooner than Monday morning. In failing to hold that this evidence made a submissible jury issue, this Court repudiates and is in direct conflict with the decision of this Court in banc in *Pulitzer* v. *Chapman*, 85 S. W. (2d) 411.

III.

Because this Court's opinions filed herein hold as a matter of law that the trip would have been made even though Collier's business had been canceled before McAtee started, and that McAtee's master, Collier, is not liable even though McAtee was at the time on a dual business and pleasure purpose using an automobile essential to the master's business, carrying with him all of his master's records, driving in a direct route within his territory to his place of business to collect, and even though after the accident had been reported to it Collier Company paid the expenses for the operation of McAtee's automobile on said trip on which plaintiff was injured.

In so holding this Court's opinions are in direct conflict with the holdings of this Court in banc and in Division No. 1 as well as in this division.

McMain v. *J. J. Conner & Sons Const. Co.* (Div. 1), 85 S. W. (2d) 43;

Brunk v. *Hamilton-Brown Shoe Co.* (Div. 1), 66 S. W. (2d) 903;

Goldbaum v. *Mulligan Printing Co.*, 149 S. W. (2d) 348;

Chastain v. *Winton*, 152 S. W. (2d) 165, l. c. 171;

State ex rel. Waters v. *Hostetter* (*In Banc*), 126 S. W. (2d) 1164;

McCoy v. *Simpson*, 139 S. W. (2d) 950.

IV.

Because this Court should not attempt to overrule the decisions of Division No. 1 or the Court in banc, but should transfer the case to the Court in banc for decision.

Wanger v. *Marr*, 257 Mo. 482.

Wherefore, respondent respectfully applies to and moves the Court to transfer the above cause into the Supreme Court of Missouri in banc.

Respectfully submitted,

FRED R. RODGERS,
N. MURRY EDWARDS,
DOUGLAS H. JONES,
Attorneys for Respondent.

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And thereafter and on the 25th day of September, 1941, the following further proceedings were had and entered of record in said cause, to-wit: (caption omitted)

Now at this day, the Court having seen and fully considered the respondent's motion to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained.

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STATE OF MISSOURI--Sct.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages contain a full, true and complete copy of the motion to transfer to Court en Banc, together with the record entries showing the filing and sustaining of said motion, in a cause entitled Edward F. Klotsch, respondent, against P. F. Collier & Son Corporation and Elmer U. McAtee, appellants, No. 37124, as fully and completely as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Jefferson City, this 9th day of July, 1942.

E. F. Elliott

(seal) Clerk, Supreme Court of Missouri.